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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

PHASE II CHIN, LLC and LOVE
& MONEY, LLC, (formerly dba
O.P.M.L.V., LLC),

Plaintiffs,

vs.

FORUM SHOPS, LLC, FORUM
DEVELOPERS LIMITED
PARTNERSHIP, SIMON
PROPERTY GROUP LIMITED
PARTNERSHIP, SIMON
PROPERTY GROUP, INC.,
CAESARS PALACE CORP, and
CAESARS PALACE REALTY
CORP.,

Defendants.

CASE NO.: 2:08-cv-162-JCM-GWF

OPPOSITION TO MOTION TO DISMISS
OF DEFENDANTS FORUM SHOPS, LLC,
FORUM DEVELOPERS LIMITED
PARTNERSHIP, SIMON PROPERTY
GROUP LIMITED PARTNERSHIP, AND
SIMON PROPERTY GROUP, INC. (#12)

INTRODUCTION

Plaintiff Phase II Chin, LLC ("Chinois") respectfully submits this Opposition to the
Motion to Dismiss of Defendants Forum Shops, LLC ("Forum"), Forum Developers Limited
Partnership, Simon Property Group Limited Partnership, and Simon Property Group, Inc.

(collectively, “defendants”). As explained below, defendants’ memorandum of points and authorities (“Defendants’ Brief”) fails utterly to establish that any of the eight causes of action in the Complaint fail to state a claim. Defendants’ motion, therefore, should be denied *in toto*.

FACTS¹

At all times relevant to this action, Chinois has leased premises (the “Premises”) in The Forum Shops² at the Caesars Palace complex in Las Vegas from Forum pursuant to a lease initially between Forum Developers Limited Partnership and GGH Restaurant, LLC, Forum’s and Chinois’ predecessors in interest, respectively (the “Lease”). Complaint ¶ 14.³ Chinois operates a restaurant called Chinois-Las Vegas in the Premises. *Id.* Chinois-Las Vegas is a fine dining establishment serving Asian/Pacific Rim and American cuisine, including certain signature dishes of world-renowned chef Wolfgang Puck. *Id.* ¶ 15.

On December 1, 2002, Forum approved Chinois’ plan for the operation of a nightclub, OPM, on the second level of the Premises to be managed by plaintiff Love & Money, at the time doing business as O.P.M.L.V., LLC (“O.P.M.L.V.”). *Id.* ¶¶ 20-21. Forum had been provided a copy of the Management Agreement pursuant to which O.P.M.L.V. was to manage the club (the “Management Agreement”) on July 10, 2002. *Id.* ¶ 21.⁴ OPM is an upscale dance

¹ This section presents only a brief summary of the allegations of the Complaint. Chinois respectfully suggests that the Court should review the Complaint in full to obtain a comprehensive understanding of the parties’ dispute.

² The Forum Shops consist of more than 160 upscale stores and restaurants in an ancient Rome-themed mall at the Caesars Palace complex. The mall is attached to the Caesars Palace casino (the “Casino”) with a large archway providing access between the Casino and The Forum Shops. While most of the retail establishments in The Forum Shops close each night at or about 11 p.m. on weekdays and 12 midnight on weekends, the mall’s common areas remain open to the public 24 hours per day, 7 days per week. Complaint ¶ 16.

³ Defendants submitted a copy of the Lease as Exhibit A to their moving papers.

⁴ Defendants submitted a copy of the Management Agreement as Exhibit C to their moving papers.

1 club that plays a range of different types of music, including hip-hop; most of its patrons are
2 African-Americans. *Id.* ¶ 22.⁵

3 Effective October 9, 2003, after OPM had been in operation for five months, at
4 defendants' suggestion, the parties executed an amendment to the Lease (the "Lease
5 Amendment") to permit Chinois to operate OPM in part of the leased Premises Wednesdays
6 through Sundays from 10 p.m. until 6 a.m. each following morning. *Id.* 22.⁶

7 Beginning in or about January 2005, defendants engaged in an ongoing and concerted
8 campaign of harassment and misconduct against plaintiffs. *Id.* 27. Defendants' misconduct
9 has been calculated to force plaintiffs out of business and has been driven by at least two
10 motives. *Id.* One of these motives stems from defendants' hostility towards, and prejudice
11 against, African-Americans, who comprise the majority of OPM's clientele. *Id.* Plaintiffs
12 believe that defendants seek to force OPM out of business because, in defendants' view, it
13 attracts "too many" African-Americans to The Forum Shops and the Caesars Palace complex
14 generally. *Id.*⁷

15
16 Chinois believes that defendants' other motive stems from the fact that the rent
17 Chinois pays under the Lease is considerably below "market" for the type of space it
18 occupies. *Id.* ¶ 29. Were defendants able to force Chinois out of The Forum Shops, they could
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20 ⁵ By March 2006, O.P.M.L.V. and Chinois had successfully operated the nightclub for
21 nearly three years in compliance with the terms and conditions of the Lease, the Lease
22 Amendment and the Management Agreement and amendments thereto. During that time,
23 OPM was the recipient of several awards, including the #1 Zagat Rated Award in 2004 and
24 2005, the AOL Cityguide City's Best Award in 2005, and the #1 Yahoo! Readers' Poll Award
25 in 2006. Complaint ¶ 26.

26 ⁶ Defendants submitted a copy of the Lease Amendment as Exhibit B to their moving
27 papers.

28 ⁷ Defendants have previously been criticized for their treatment of minorities. For
example, in March 2007, ACORN, a self-described community organization of low and
moderate income families, published a report, "Racial Discrimination at Simon Malls: A
Separate and Unequal Shopping Experience for People of Color," describing racial
discrimination at a "Simon Property Group" mall in Colorado. Similarly, in a December 2007
meeting before the Nevada Gaming Control Board, eleven groups representing minority
communities criticized Harrah's Entertainment, Inc., Caesars' parent corporation, for its lack
of transparency in its diversity efforts. Complaint ¶ 28.

1 then lease the Premises to a new tenant at a substantially higher rent, which would, of course,
2 yield for them correspondingly higher profits than they currently receive under the Lease. *Id.*

3 As detailed in the Complaint, defendants' misconduct has taken a variety of forms. *Id.*
4 ¶ 30. First, almost every time when there has been any sort of security problem in any way
5 involving an African-American anywhere in the Caesars Palace complex, defendants have
6 sought to blame plaintiffs, even, as explained below, when it can be clearly demonstrated that
7 the persons involved were not OPM patrons, and when the problems have arisen in The
8 Forum Shops' common areas or on Caesars property, where plaintiffs have no security
9 obligations and, moreover, no right to provide security. *Id.*
10

11 Second, defendants have discriminated against Chinois and OPM, and treated Chinois,
12 and by extension OPM, differently, and less favorably, than other similarly situated tenants of
13 The Forum Shops. *Id.* ¶ 31.

14 Finally, defendants have missed no opportunity to serve Chinois with formal legal
15 notices of purported defaults under the Lease for even the most minor perceived transgression,
16 instead of simply bringing these issues to Chinois' attention informally, as is customarily done
17 with other tenants of The Forum Shops. *Id.* ¶ 32.
18

19 The Complaint states eight causes of action: (1) declaratory relief (First Cause of
20 Action); (2) interference with contractual relations (Second Cause of Action); (3) interference
21 with prospective business advantage (Third Cause of Action); (4) injunctive relief (Fourth
22 Cause of Action); (5) violation of 42 U.S.C. § 1981 (Fifth Cause of Action); (6) breach of the
23 Lease (Sixth Cause of Action); (7) civil conspiracy (Seventh Cause of Action); and (8) breach
24 of the covenant of good faith and fair dealing (Eighth Cause of Action).
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ARGUMENT

I. The Fed.R.Civ.P. 12(b)(6) Standard

In *Angel v. Eldorado Casino, Inc.*, 2008 U.S. Dist. LEXIS 37491, *4-*5 (D. Nev. April 25, 2008), Judge Sandoval of this district recently explained the standard for dismissal under Fed.R.Civ.P. 12(b)(6) as follows:

In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept as true all material allegations in the complaint as well as all reasonable inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150 (9th Cir. 2000). The allegations of the complaint also must be construed in the light most favorable to the nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). The purpose of a motion to dismiss under Rule 12(b)(6) is to test the legal sufficiency of the complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). However, there is a strong presumption against dismissing an action for failure to state a claim. See *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted). Thus, upon being adequately stated, a claim may be supported by showing "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007) (citation omitted). However, the factual allegations included in a complaint "must be enough to raise a right to relief above the speculative level." *Id.* at 1964-65. "The pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* at 1965.

2008 U.S. Dist. LEXIS 37491, *4-*5; accord *Weber v. Dep't of Veterans Affairs*, 521 F.3d 1061, 1065 (2008) ("To avoid a Rule 12(b)(6) dismissal, a complaint need not contain detailed factual allegations; rather, it must plead 'enough facts to state a claim to relief that is plausible on its face.'" (quoting *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007))); *McGrath v. Nevada Dep't of Public Safety*, 2008 U.S. Dist. LEXIS 38814, *3 (D. Nev. April 30, 2008) (citing *Wyler Summit Partnership v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998) and *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997)).

Defendants' incomplete recitation of this standard belies their understanding that they cannot satisfy it.

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II. Chinois' Declaratory Relief Claim Should Not Be Dismissed

A. Defendants Do Not Seek Dismissal of Chinois' Declaratory Relief Claim On Rule 12(b)(6) Grounds

Defendants do not seek dismissal of Chinois' claim for declaratory relief (First Cause of Action) under Rule 12(b)(6). Indeed, nowhere in their brief do they state that the First Cause of Action fails to state a claim upon which relief may be granted, nor could they. A declaratory relief claim need allege only "[f]acts demonstrating the existence of an actual controversy, including facts showing standing and ripeness." 12 Moore's Federal Practice—Civil § 57.60[1] (2008) (citations omitted).

An "actual controversy" exists where the parties' dispute is "'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Id.* § 57.22[2][a] (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937)).

With respect to standing, "[t]he Declaratory Judgment Act permits any interested party to seek declaratory relief." Moore's, *supra*, § 57.22[2] (citing 28 U.S.C. § 2201(a) and Advisory Committee Note to 1937 Adoption to *Fed. R. Civ. P.* 57).

"[T]he concept of ripeness relates to the Article III standing requirement that a plaintiff must sustain or face an actual or imminent injury." Moore's, *supra*, § 57.22[3][a] (and cases cited).

There can be no question that the dispute as alleged here meets all these requirements—Forum, lessor under the Lease, seeks to evict Chinois, the lessee, and has served Chinois with numerous purported notices of default to effect that end. The parties' dispute is thus definite and concrete, they have directly adverse legal interests and Chinois is obviously an "interested party" facing actual or imminent injury.

Apparently recognizing that Chinois has adequately pled its claim for declaratory relief, defendants make what is essentially an abstention argument, without labeling it as such

1 or making any attempt to cogently lay out the applicable law. This is perhaps not surprising
2 given that, as explained below, abstention here would be manifestly improper.

3 **B. The Court Should Hear Chinois' Declaratory Relief Claim**

4 Defendants contend that this Court should abstain from hearing Chinois' declaratory
5 relief claim in deference to one Forum filed in Delaware state court, even though all of the
6 relevant parties are headquartered in Nevada, Nevada law expressly governs all the relevant
7 contracts, all of the relevant events occurred in Nevada, all of the witnesses are in Nevada, all
8 of the documentary evidence is in Nevada, and the only state with any conceivable interest in
9 the case's outcome is Nevada.
10

11 The Declaratory Judgment Act, 28 U.S.C. § 2201, affords District Courts discretion as
12 to "whether and when to entertain an action under the . . . Act, even when the suit otherwise
13 satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515 U.S. 277,
14 282 (1995). When the action at issue consists *solely* of a request for declaratory relief, that
15 discretion is very broad. *Id.* at 282-283 (applying *Brillhart v. Excess Ins. Co. of America*, 316
16 U.S. 491 (1942)).
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18 But "[i]f a suit seeks both injunctive and declaratory relief, the appropriateness of
19 abstention must be assessed according to the general abstention doctrine of *Colorado River*
20 *Water Conservation Dist. v. U.S.*, [424 U.S. 800 (1976)], rather than under *Brillhart*."
21 Moore's, *supra*, § 57.42[b][ii][B] (citing *Black Sea Investment, Ltd. v. United Heritage Corp.*,
22 204 F.3d 647, 652 (5th Cir. 2000); *accord Gov't Employees Ins. Co. v. Dizol*, 133 F.3d 1220,
23 1225 (9th Cir. 1998) ("when other claims are joined with an action for declaratory relief (*e.g.*,
24 bad faith, breach of contract, breach of fiduciary duty, rescission, or claims for other monetary
25 relief), the district court should not, as a general rule, remand or decline to entertain the claim
26 for declaratory relief"); *Snodgrass v. Provident Life & Accident Ins. Co.*, 147 F.3d 1163, 1167
27 (9th Cir. 1998) (same); *Unum Life Ins. Co. of America v. Humphrey*, 2008 WL 182251, *2 (D.
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1 Nev. Jan. 15, 2008) (same where declaratory relief claim joined with rescission claim); *Cedar*
2 *Rapids Cellular Tel., LP v. Miller*, 280 F.3d 874, 879 (8th Cir. 2002) (*Brillhart* not applicable
3 to cases that involve claims for injunctive relief); *Westfield v. Welch's*, 170 F.3d 116, 124 n.5
4 (2d Cir. 1999) (applying *Colorado River* where federal action did not seek “purely declaratory
5 relief”). This is because “[c]laims that exist independent of the request for a declaration are
6 not subject to the Declaratory Judgment Act's discretionary jurisdictional rule.” *Snodgrass*,
7 147 F.3d at 1167.

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9 *Colorado River* abstention is far narrower than *Brillhart* abstention. As the Supreme
10 Court recognized in *Colorado River*, the former is “an extraordinary and narrow exception” to
11 the “virtually unflagging obligation of the federal courts to exercise the jurisdiction given
12 them.” 424 U.S. at 813, 817. Abstention is proper only where “exceptional circumstances”
13 exist. *Id.* at 813.

14 The party seeking abstention bears the burden of establishing such exceptional
15 circumstances. *See, e.g., Communications Telesystems Int'l v. California Public Utility*
16 *Comm'n*, 196 F.3d 1011, 1020 (9th Cir. 1999). Defendants have certainly not borne this
17 burden here. Indeed, there is no reason under law or common sense why a federal court sitting
18 in Nevada should defer to a state court across the continent in Delaware with respect to a case
19 involving Nevada parties and Nevada events, that will be resolved applying Nevada law and
20 considering documentary evidence located in Nevada, and almost exclusively the testimony of
21 Nevada witnesses, especially when that Delaware case was so transparently filed solely to
22 complicate and make more expensive a full airing of the parties' Nevada disputes.⁸
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26 ⁸ Should the Court decide to abstain (and under the circumstances here, it clearly should
27 not), the proper procedure would be to stay Chinois' declaratory relief claim rather than to
28 dismiss it. “[W]here the basis for declining to proceed is the pendency of a state proceeding, a
stay will often be the preferable course, because it assures that the federal action can proceed
without risk of a time bar if the state case, for any reason, fails to resolve the matter in
controversy. *Wilton*, 515 U.S. at 288 n. 2.

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III. The Second Cause of Action States A Claim for Intentional Interference With Contractual Relations

Chinois' Second Cause of Action states a claim for intentional interference with its contractual relations with O.P.M.L.V. The elements of such a claim are: "(1) a valid and existing contract; (2) the defendant's knowledge of the contract; (3) intentional acts intended or designed to disrupt the contractual relationship; (4) actual disruption of the contract; and (5) resulting damage." *Hilton Hotels Corp. v. Butch Lewis Productions, Inc.*, 109 Nev. 1043, 1048, 862 P.2d 1207 (1993) (citing *Ramona Manor Convalescent Hosp. v. Care Enterprises*, 177 Cal. App. 3d 1120, 1130, 225 Cal. Rptr. 120, 124 (1986)). This much defendants get right. But their two arguments for the dismissal of the Second Cause of Action are meritless.

Defendants first contend that the Second Cause of Action fails because "there is no valid contract between Chinois and [O.P.M.L.V.] because the [Management Agreement] was in violation of the terms of the Lease." Defendants' Brief at 14. Defendants misapprehend the very nature of a motion to dismiss under Rule 12(b)(6). That rule simply "tests the legal sufficiency of the claims asserted in the complaint." *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). The court "'must take 'all well-pleaded allegations of material fact as true and construe them in the light most favorable to the plaintiff.'" *Id.* at 1200 (quoting *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1021 (9th Cir. 2000)). Paragraph 19 of the Complaint unambiguously alleges that "[t]he Management Agreement did not assign or transfer any of Chinois' rights or obligations under the Lease to O.P.M.L.V. and did not in any respect constitute a sublease of the leased premises." Defendants cannot dispose of one of the principal issues in dispute on a motion to dismiss simply by stating their position and saying it is so.

Moreover, courts have repeatedly and consistently held that issues of contractual interpretation and validity are not appropriate for decision on a Rule 12(b)(6) motion. *See, e.g., Martin Marietta Corp. v. Int'l Telecomm. Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992);

1 Lipsky v. Commonwealth United Corp., 551 F.2d 887, 897 (2d Cir.1976); Harmon v. Adjoined
2 Consulting, LLC, 2007 U.S. Dist. LEXIS 60050, *18 (S.D. Fla. Aug. 16, 2007); Ventana
3 Hotels & Resorts, LLC v. Habana Libre Hotel, LLC, 2007 U.S. Dist. LEXIS 49979, *4-*5
4 (S.D. Fla. 2007); Test Services, Inc. v. The Princeton Review, Inc., 2005 U.S. Dist. LEXIS
5 31417, * (D. Colo. Nov. 29, 2005); Holveck v. Ameriquest Mortgage Co., 2003 U.S. Dist.
6 LEXIS 8365, *9 (N.D. Ill. May 19, 2003); Associated Credit Corp. v. Crossley Carpet Mills
7 Ltd., 1998 U.S. Dist. LEXIS 12567, *5-*6 (S.D.N.Y. Aug. 14, 1998). Defendants' first
8 argument against Chinois Second Cause of Action simply ignores these commonsense, settled
9 principles and must therefore be rejected.⁹

11 Defendants' second argument against Chinois' Second Cause of Action, that Chinois
12 has failed adequately to allege "actual disruption" of its contract with O.P.M.L.V.,¹⁰ is equally
13 infirm, and cannot withstand even a cursory review of the Management Agreement and the
14 allegations of the Complaint.

15 It is clear from that agreement that the essence of the contractual relationship between
16 Chinois and O.P.M.L.V. is the operation of a nightclub, OPM, in the second level of the
17 Premises in a fashion profitable to both parties. The Complaint alleges that defendants have
18 "actually disrupted" that relationship in at least the following ways:

- 20 • Since August 17, 2007, defendants, acting in concert, have closed the entrance
21 between the Casino and The Forum Shops weekend evenings at 1 a.m., after all other
22 Forum Shops tenants have closed, but just before OPM's busiest time, and posted a

23 ⁹ Defendants offer speculation regarding the drafting of the Management Agreement
24 (Defendants' Brief at 3 n.1), and also go to great lengths attempting to explain away the fact
25 that they received a copy of that agreement prior to the execution of the Lease Amendment,
26 but never uttered a peep of protest about it, or labeled it an improper "sublease" until much
27 later. Defendants Brief at 4 n. 5. While Chinois disagrees with defendants' factual and legal
28 assertions and analyses, it declines to engage defendants over issues that are utterly irrelevant
in the context of a Rule 12(b)(6) motion. It does warrant note, however, that defendants' highlighting of these factual and legal disputes makes dismissal under Rule 12(b)(6) all the more inappropriate.

¹⁰ Defendants concede through their silence that Chinois has adequately alleged all the other elements of their Second Cause of Action.

1 sign reading, "Forum Shops to Reopen at 8 a.m." Complaint ¶ 59. As a result, many
2 OPM patrons leave, thinking OPM is also closed, or out of business. *Id.* ¶ 60. Those
3 undeterred have been forced to use an unmarked, poorly lit and potentially unsafe back
4 hallway to gain entry to The Forum Shops and access OPM. *Id.* Given that most of
5 OPM's clients are African-American, this is especially degrading, and reminiscent of
6 Jim Crow laws that required blacks to use "service entrances." It is difficult to
7 conceive of exactly how tricking a nightclub's patrons into believing the club is
8 closed, and then degrading those who discover that it is not, does not constitute an
9 "actual disruption" of that establishment's business.

10 • Despite its obligations under the Lease, and several complaints from both
11 Chinois and O.P.M.L.V., Forum refuses to provide adequate air conditioning to the
12 space occupied by OPM, and also refuses to permit the space to be glassed in (as are
13 many other businesses in The Forum Shops) to prevent what air conditioning there is
14 from simply escaping out into the mall. Complaint ¶¶ 69-70. Patrons have become ill
15 from the excessive heat and one actually had to be taken away in an ambulance. *Id.* It
16 is difficult to understand how knowingly causing a nightclub's customers to collapse
17 from heat exhaustion does not constitute an "actual disruption" of the club's business.

18 • In March 2007, Forum (on Simon letterhead) complained that O.P.M.L.V. had
19 placed signs directing patrons to OPM in certain common areas, as Forum had agreed
20 to permit beginning in 2003. Complaint ¶¶ 56-57. Here again, it is difficult to see how
21 making it more difficult for a business' customers to find the business does not
22 constitute "actual disruption" of that business.

23 The Management Agreement itself also makes clear the "actual disruption"
24 defendants' wrongdoing has caused. That agreement includes several relevant provisions.
25 Under § 8.1, Chinois provides food to OPM. Under § 8.1(d), O.P.M.L.V. pays Chinois for that
26 food. Under § 8.2, Chinois under certain circumstances also purchases beverages for
27 O.P.M.L.V. for use in the club. Under § 12.1, O.P.M.L.V. is required to pay Chinois a
28 percentage of its monthly gross sales exceeding a certain amount.

Each of these provisions in the Management Agreement obviously makes Chinois'
receipts under that contract dependent in significant part on OPM's profitability, which is in
turn just as obviously dependent upon the number of patrons OPM serves. Fewer patrons
means less food ordered from Chinois, and less beverages purchased by OPM. Fewer patrons
also means lower gross sales for O.P.M.L.V., hence lowering Chinois' percentage under §
12.1. It necessarily follows, therefore, that the misconduct of defendants described above may
reasonably be inferred to have decreased the number of patrons at OPM and also decreased

1 Chinois' receipts under the Management Agreement, thereby "actually disrupting" the
2 relationship between Chinois and O.P.M.L.V. *See, e.g., First American Real Estate*
3 *Information Services, Inc. v. Consumer Benefit Services, Inc.*, 2004 U.S. Dist. LEXIS 30316,
4 *17 (S.D. Cal. April 23, 2004) (motion to dismiss denied where plaintiff alleged it was
5 "damaged by lost profits that it would have earned but for [defendant's] interference").

6 Defendants, therefore, have failed to establish any legal basis for the dismissal of
7 Chinois' claim for interference with contractual relations. Their motion must therefore be
8 denied with respect to the Second Cause of Action.

9
10 **IV. The Third Cause of Action States A Claim for Intentional Interference With**
11 **Prospective Business Advantage**

12 The elements of a claim for intentional interference with prospective business
13 advantage are: "(1) a prospective contractual relationship between the plaintiff and a third
14 party; (2) the defendant's knowledge of this prospective relationship; (3) the intent to harm the
15 plaintiff by preventing the relationship; (4) the absence of privilege or justification by the
16 defendant; and, (5) actual harm to the plaintiff as a result of the defendant's conduct." *Leavitt*
17 *v. Leisure Sports, Inc.*, 103 Nev. 81, 88, 734 P.2d 1221, 1225 (1987) (citing *Buckaloo v.*
18 *Johnson*, 14 Cal. 3d 815, 827, 537 P.2d 865, 872 (Cal. 1975)). Again, defendants get the
19 elements right, but the two arguments they assert for the dismissal of the Third Cause of
20 Action are each meritless.

21
22 Defendants' first argument goes to the fourth element of the Third Cause of Action,
23 that defendants "acted, without right or privilege, to harm plaintiffs . . ." Complaint ¶ 82. In
24 essence, defendants assert a sort of "counter-allegation"—that the misdeeds about which
25 Chinois complains were actually "privileged and/or justified safety and security measures . .
26 .." Defendants' Brief at 15. Defendants apparently believe that all they need do to defeat the
27 Third Cause of Action is simply deny its allegations. That, however, is not the way Rule
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12(b)(6) works. All allegations in Chinois' Complaint must be accepted as true, and construed in Chinois' favor.

Moreover, the law is unambiguous—whether a defendant acts without privilege or justification is a factual issue, and hence by its very nature inappropriate for decision on a Rule 12(b)(6) motion. *See, e.g., Trans-World Airline, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 694 (9th Cir. 1990) (relying on *Lowell v. Mother's Cake & Cookie Co.*, 79 Cal. App. 3d 13, 20, 144 Cal. Rptr. 664, 669 (1978)); *Nilavar v. Mercy Health System-Western Ohio*, 494 F. Supp. 2d 604, 626 (S.D.N.Y. 2005) (citing *Juhasz v. Quik Shops, Inc.*, 55 Ohio App. 2d 51, 57, 379 N.E.2d 235, 238 (1977)); *Ayres v. AG Processing, Inc.*, 345 F. Supp. 2d 1200, 1215 (D. Kan. 2004); *Stucchio v. Huffstetler*, 720 So. 2d 288, 290 (Fla. App. 1998).

Defendants' second argument fares no better. Defendants argue that plaintiffs fail to allege a prospective contractual relationship between themselves and their patrons because, according to defendants: (1) "[b]usinesses normally do not have a contractual relationship with their at will patrons;" and because (2) plaintiffs' "expectation of future and prospective sales to these customers . . . is too speculative." Defendants' Brief at 15-16. Defendants are wrong on both points. With respect to (1), as courts have repeatedly held, "dining at a restaurant generally involves a **contractual relationship** that continues over the course of the meal and entitles the customer to benefits in addition to the meal purchased." *Arguello v. Conoco Inc.*, 330 F.3d 355, 360-361 (5th Cir. 2003) (distinguishing restaurants and clubs from other retail establishments) (emphasis added); *accord Gennell v. Denny's Corp.*, 378 F. Supp. 2d 551, 557 (D. Md. 2005); *Callwood v. Dave & Buster's, Inc.*, 98 F. Supp. 2d 694, 702-03 (D. Md. 2000) (and cases cited); *Charity v. Denny's, Inc.*, 1999 U.S. Dist. LEXIS 11462 *11 (E.D. La. 1999); *McCaleb v. Pizza Hut of America, Inc.*, 28 F. Supp. 2d 1043, 1048 (N.D. Ill.

1998). The prospective relationship between plaintiffs and their patrons, therefore, is manifestly “contractual.”¹¹

With respect to (2), defendants rely exclusively on *Google Inc. v. American Blind & Wallpaper Factory, Inc.*, 74 U.S.P.Q.2D (BNA) 1385, 2005 U.S. Dist. LEXIS 6228 (N.D. Cal. March 30, 2005). The *Google* court held plaintiff’s allegations of “relationships with ‘repeat customers’ who ‘probabl[y]’ [would] ‘continue to seek to visit’ its web site and purchase its goods and services” to be too speculative to support a claim for interference with prospective business advantage because they expressed “merely a ‘hope . . . and a desire’ for unspecified future sales to unspecified returning customers.” 2005 U.S. Dist. LEXIS 6228 at *39-*40.

In stark contrast, there is absolutely nothing “speculative” about plaintiffs’ allegations here. Unlike plaintiff in *Google*, plaintiffs’ claim here does not rest on speculation about customers who might possibly have visited a web site, and, while there, would maybe have bought something. Instead, plaintiffs here allege that ***real, identifiable customers*** actually ***did*** arrive at The Forum Shops, fully intent on patronizing OPM, but were prevented from doing so because, among other reasons, the door between the Casino and The Forum Shops had been closed and a deceptive sign had been posted, specifically intended to turn them away, or because they opted not to use an unmarked, poorly lit, potentially unsafe and degrading alley and/or back hallway to gain entry to The Forum Shops and access OPM. Complaint ¶¶ 60-61. Plaintiffs also allege that ***real, identifiable customers*** of OPM who were trying to patronize

¹¹ Defendants rely on *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324 (9th Cir. 1980) for the proposition that businesses may solicit each other’s customers without incurring liability for interference with prospective business advantage. Defendants’ Brief at 15-16. *Hollingsworth* “principally concern[ed] the circumstances in which California law permits a salesman who leaves his employer to solicit the employer’s customers by using various kinds of information acquired in his first position.” *Id.* at 1326. This case, however, is not about businesses competing for customers, or the extent to which one might compete with a former employer. Plaintiffs here allege that defendants deliberately and maliciously interfered with plaintiffs’ relationships with their patrons, and did so largely out of racial bias. *Hollingsworth* is immaterial here.

1 the club became sick because defendants refused to provide adequate air conditioning to the
2 club, and that one such *real, identifiable customer* actually had to be taken away in an
3 ambulance. *Id.* ¶ 69. Defendants “speculative allegations” argument is thus baseless.

4 **V. The Fourth Cause of Action States A Claim for Injunctive Relief**

5 Defendants contend that Chinois’ Fourth Cause of Action, for injunctive relief, fails to
6 state a claim because the causes of action upon which it is based themselves fail to state
7 claims. Defendants are incorrect.

8 **A. Chinois’ Demand that Defendants Cease and Desist from Interfering With**
9 **Contract and Prospective Business Advantage**

10 Defendants argue that the Fourth Cause of Action fails to state a claim with respect to
11 its demand that defendants cease and desist interfering with their contractual relationship with
12 O.P.M.L.V. and with their prospective and actual business relationships with patrons because:
13 (1) Chinois Second and Third Causes of Action purportedly fail to state claims; and (2)
14 injunctive relief is purportedly unavailable to prohibit such interference.
15

16 With respect to (1), Chinois respectfully refers the Court to Parts III and IV above,
17 where Chinois demonstrates that both its Second and Third Causes of Action easily satisfy the
18 Rule 12(b)(6) standard.

19 With respect to (2), defendants simply ignore the law. It is well settled that
20 “[i]njunctive relief is available to restrain unjustified interference with contractual relations
21 when damages would not afford an adequate remedy.” *Pacific Gas & Electric Co. v. Bear*
22 *Stearns & Co.*, 50 Cal.3d 1118, 1130 n. 9, 791 P.2d 587, 270 Cal. Rptr. 1 (1990) (citing
23 *Imperial Ice v. Rossier*, 18 Cal.2d 33, 112 P.2d 631 (1941); *Remillard-Dandini Co. v.*
24 *Dandini*, 46 Cal. App. 2d 678, 680, 116 P.2d 641(1941); *Heavener, Ogier Services v. R.W.*
25 *Fla. Region*, 418 So. 2d 1074, 1076, 1077 (Fla. 1982); Restatement (Second) Torts § 766
26 comment u at 17; and Prosser and Keeton, Torts § 129 at 1002 (5th ed. 1984)); *accord*
27 *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1243 (10th Cir. 2006); *Northern PCS*
28

1 *Services, LLC v. Sprint Nextel Corp.*, 2006 U.S. Dist. LEXIS 22555, *15 (D. Minn. April 21,
2 2006) (citing *Metropolitan Sports Facilities Comm'n v. Minnesota Twins Partnership*, 638
3 N.W.2d 214, 228 (Minn. Ct. App. 2002)); *Telerate Systems, Inc. v. Caro*, 689 F. Supp. 221,
4 233-234 (S.D.N.Y. 1988).

5 **B. Chinois' Demand that Defendants Cease and Desist from Serving Improper**
6 **Notices of Default Under the Lease**

7 Defendants assert that Chinois' request for an injunction prohibiting defendants from
8 continuing to serve improper, baseless notices of default under the Lease "would be an
9 unconstitutional prior restraint on the exercise of a defendant's First Amendment Right of free
10 speech," purporting to rely upon *Alexander v. U.S.*, 509 U.S. 544 (1993). Defendants' Brief at
11 17-18. Defendants' argument is frivolous. *Alexander* concerned the lawfulness of the District
12 Court's order requiring petitioner, who had been convicted of violating obscenity laws and the
13 Racketeer Influenced and Corrupt Organizations Act, to forfeit his adult entertainment
14 business.
15

16 Here, Chinois seeks nothing more exotic than an order that defendants comply with
17 the Lease, an entirely routine request. *See, e.g., Stoltz v. Grimm*, 100 Nev. 529, 533, 689 P.2d
18 927, 930 (1984); *Myers v. Jones*, 99 Nev. 91, 93, 657 P.2d 1163, 1164 (1983); *General*
19 *Motors Corp. v. Manly Oldsmobile-GMC, Inc.*, 2007 U.S. Dist. LEXIS 21489, *8-*9 (N.D.
20 Cal. March 12, 2007).
21

22 **C. Chinois' Demand That Defendants Cease and Desist Their Racially-**
23 **Motivated Misconduct**

24 Defendants assert that Chinois has failed to state a claim for injunctive relief with
25 respect to their racially-motivated misconduct because: (1) Chinois' claim under 42 U.S.C. §
26 1981 (Fifth Cause of Action) is purportedly invalid; and (2) an injunction would not be a
27 proper form of relief.
28

1 With respect to (1), Chinois respectfully refers the Court to Part VI below, where it
2 demonstrates that its Fifth Cause of Action unambiguously states a proper claim.

3 With respect to (2), the U.S. Supreme Court has expressly held that “[a]n individual
4 who establishes a cause of action under § 1981 is entitled to both equitable and legal relief,
5 including compensatory and, under certain circumstances, punitive damages.” *Johnson v.*
6 *Railway Express Agency, Inc.*, 421 U.S. 454, 460 (1975); *accord U.S. v. Burke*, 504 U.S. 229,
7 240 (1992) (relying on *Johnson*); *Miller v. Fairchild Indus. Inc.*, 797 F.2d 727, 733 (9th Cir.
8 1986).

9
10 Based for the most part on antediluvian authority not involving § 1981, defendants
11 argue that the injunction Chinois seeks would “be incapable of judicial supervision,”
12 “inconvenient or inefficient to administer” and “would require a continuous supervision by
13 the court” because “[a] court has no way to monitor motivation.” Defendants’ Brief at 18.
14 There are two answers to this “reasoning.” First, Chinois does not seek to regulate defendants’
15 “*motivation*.” It demands only that they cease and desist their racially-biased *conduct*.
16 Second, that the U.S. Supreme Court has expressly held equitable relief to be available under
17 § 1981, and that courts have indeed granted such relief, gives the lie to defendants’
18 infeasibility argument.
19

20 **VI. The Fifth Cause of Action States A Claim for Violation of 42 U.S.C. § 1981**

21 **A. Chinois Has Standing to Assert Its § 1981 Claim**

22 Defendants argue that Chinois lacks standing to assert a claim under 42 U.S.C. § 1981
23 because Chinois has no “particular racial identity” and “cannot sue for the alleged deprivation
24 of their customer’s [sic] rights.” Defendants’ Brief at 21. One of the very cases upon which
25 defendants purport to rely, however, *Thinkjet Ink Information Resources, Inc. v. Sun*
26 *Microsystems, Inc.*, 368 F.3d 1053 (9th Cir.), as well as many others treated below, prove them
27 wrong.
28

1 *Thinkjet* expressly holds “that if a corporation either suffers discrimination harm
2 cognizable under § 1981, *or* has acquired an imputed racial identity, it is sufficiently within
3 the statutory zone of interest to have prudential standing to bring an action under § 1981.” *Id.*
4 at 1055 (emphasis added). Defendants improperly ignore the first part of the *Thinkjet* holding.
5 Elaborating on that holding later in the decision, the court stated that a “corporation ha[s] ‘an
6 implied right of action against any other person who, with a racially discriminatory intent,
7 interferes with its right to make contracts with non-whites.’” *Id.* at 1058 (quoting *Des Vergnes*
8 *v. Seekonk Water District*, 601 F.2d 9, 13-14 (1st Cir. 1979).

9
10 *Des Vergnes* is instructive. There, the corporate plaintiff, owner of a tract of land, sued
11 defendant city water district under § 1981 for having refused to include the tract in the district
12 because the district believed plaintiff intended to sell lots on the land to African-Americans.
13 601 F.2d at 11-12. The court reversed the district court’s dismissal of plaintiff’s § 1981 claim,
14 explaining:

15 The text of § 1981 does not explicitly give a cause of action to [plaintiff]
16 inasmuch as it is “a corporation (which) has no racial identity and cannot be the
17 direct target of . . . alleged discrimination.” . . . But that is not the end of the
18 matter.

19 After the Supreme Court in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229,
20 237, 90 S. Ct. 400, 24 L. Ed. 2d 386 (1969) held that the parallel text of 42
21 U.S.C. § 1982 gave a cause of action to a white person against another who
22 had injured the white person because he had made an assignment of property to
23 a black, lower federal courts held that a white person had a cause of action
24 under § 1981 against another who injured him because he made a contract with
a black, *DeMatteis v. Eastman Kodak Co.*, 511 F.2d 306, *modified* 520 F.2d
409 (2nd Cir. 1975), or because he protested the racially discriminatory
discharge of a black, *Winston v. Lear-Siegler, Inc.*, 558 F.2d 1266 (6th Cir.
1977), or because he associated with blacks, *Faraca v. Clements*, 506 F.2d 956
(5th Cir. 1975).

25 Those cases stand for two propositions: *to invoke § 1981 or § 1982 one need*
26 *not be a member of the racial class protected by the statute and one need not*
27 *even be able to identify any specific member of the class who suffered or may*
28 *suffer discrimination.*

* * *

1 From *Sullivan* and from cognate cases under § 1981, we conclude that, in
2 order to effectuate the public policy embodied in § 1981, and in order to
3 protect the legal rights of non-whites expressly created by § 1981, a person
4 has an implied right of action against any other person who, with a racially
5 discriminatory intent, interferes with his right to make contracts with non-
whites. A fortiori a person has an implied Right of action against any other
person who, with a racially discriminatory intent, injures him because he
made contracts with non-whites.

6 601 F.2d at 13-14 (emphasis added; citation omitted).

7 Nor is *Des Vergnes* in any sense a fluke. Indeed, many other courts have held that
8 corporations and/or non-minorities may sue under § 1981 when they are harmed by
9 defendant's discriminatory actions against third-party minorities. *Humphries v. CBOCS West,*
10 *Inc.*, 474 F.3d 387 (7th Cir. 2007), *aff'd*, 128 S. Ct. 1951 (2008) collects some of the relevant
11 cases.¹² Under this authority, it is beyond reasonable argument that plaintiffs have standing to
12 assert their § 1981 claim because, as alleged in the Complaint, they have suffered direct harm
13 as a result of defendants' unlawful discriminatory treatment both of themselves and their
14 patrons on the basis of race.

15
16
17 ¹² *Id.* at 403 n. 11 (citing to *Johnson v. University of Cincinnati*, 215 F.3d 561,
18 575 (6th Cir. 2000) (holding it was clear under "well-settled" law that a plaintiff "need not
19 have alleged discrimination based upon his race as an African-American in order to satisfy the
20 protected status requirement of his claims[,] but rather plaintiff's advocacy on behalf of
21 minorities was sufficient to allege retaliation under § 1981); *Skinner v. Total Petroleum, Inc.*,
22 859 F.2d 1439, 1446-1447 (10th Cir. 1988) (white employee fired for helping African-
23 American co-worker file an EEOC claim could state a claim under § 1981); *Pinkard v.*
24 *Pullman-Standard, Div. of Pullman, Inc.*, 678 F.2d 1211, 1229 (5th Cir. 1982) (retaliatory
25 discharge claim allowed under § 1981 where evidence showed plaintiff was discharged for
26 lawful advocacy of minority and union rights); *Liotta v. Nat'l Forge Co.*, 629 F.2d 903, 906-
27 907 (3d Cir. 1980) (summary judgment inappropriate where material issues of fact remained
28 regarding § 1981 claim brought by plaintiff who claimed he was discharged for supporting
rights of African-American co-workers); *Fiedler v. Marumsco Christian School*, 631 F.2d
1144, 1149 (4th Cir. 1980) (white student protected under § 1981 from retaliation by school
because of her association with a black schoolmate); *Winston v. Lear-Siegler, Inc.*, 558 F.2d
1266, 1270 (6th Cir. 1977) (white plaintiff had standing under § 1981 for claim that employer
fired him because he objected to discriminatory discharge of African-American co-worker);
DeMatteis v. Eastman Kodak Co., 511 F.2d 306, 312 (2d Cir. 1975) (white plaintiff could
bring § 1981 claim based upon allegation that his employer "forced" him into retirement
solely because he had sold his house to a black person") (parentheticals by the *Humphries*
court)).

1 The two cases defendants cite in support of their position are not to the contrary. The
2 court in *Benjamin v. Aroostook Medical Center, Inc.*, 57 F.3d 101 (1st Cir. 1995) upheld the
3 dismissal of a claim brought by certain patients of an African-American physician whose staff
4 privileges has been terminated by defendant hospital, reasoning that the patients' claims were
5 really "an assertion of [the physician's] third-party right to a race-neutral review process." *Id.*
6 at 105. The *Benjamin* court, however, specifically recognized that standing is proper in cases
7 such as *Des Vergnes*, "in which the plaintiff was the direct target of the defendant's
8 discriminatory action." *Id.*

9
10 Unlike the patient plaintiffs in *Benjamin*, who were not the targets of the hospital's
11 allegedly discriminatory termination of the physician's staff privileges, plaintiffs here have
12 unambiguously alleged that defendants' misdeeds, from the repeated service of unwarranted
13 default notices to the closure of the door between the Casino and The Forum Shops to the
14 refusal to provide adequate air conditioning, while motivated by racial bias against plaintiffs'
15 patrons, nonetheless targeted plaintiffs themselves, thereby bringing them well within "the
16 statutory zone of interest to have prudential standing to bring an action under § 1981."
17 *Thinkjet*, 368 F.3d at 1055.

18
19 Defendant's second case, *Ramirez v. City of Reno*, 925 F. Supp. 681 (D. Nev. 1996)
20 was apparently tossed in for ornamental purposes—the court there stated that defendants were
21 "entitled to judgment on Plaintiff's Section 1981 claim" because "[n]owhere in the complaint
22 [did] Mr. Ramirez allege any racial discrimination."

23 **B. Chinois Has Adequately Stated Its § 1981 Claim**

24
25 Defendants next contend that "Plaintiffs [c]annot [e]stablish the [r]equisite [e]lements
26 of a § 1981 [p]rima [f]acie [c]ase," relying solely on an Eighth Circuit case that concerned a
27 motion for summary judgment, not one under Rule 12(b)(6). Defendants' Brief at 22 (relying
28 on *Bediako v. Stein*, 354 F.3d 835 (8th Cir. 2004). Plaintiffs, however, are not required to

1 “establish . . . a prima facie case” at the pleadings stage, before discovery has even begun. A
2 Ninth Circuit panel recently described the pleading standard governing civil rights claims as
3 follows:

4 Federal Rule of Civil Procedure 8(a) states that a complaint only requires a
5 "short and plain statement of the claim showing that the pleader is entitled to
6 relief." This court has repeatedly held that "[a] party need not plead specific
7 legal theories in the complaint, so long as the other side receives notice as to
8 what is at issue in the case." Sagana v. Tenorio, 384 F.3d 731, 736-37 (9th Cir.
9 2004) (quoting Am. Timber & Trading Co. v. First Nat'l Bank, 690 F.2d 781,
10 786 (9th Cir. 1982)). "[The] simplified notice pleading standard relies on
11 liberal discovery rules and summary judgment motions to define disputed facts
12 and issues and to dispose of unmeritorious claims." Swierkiewicz v. Sorema
13 N.A., 534 U.S. 506, 512, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002). **Furthermore,**
14 ***civil rights complaints are liberally construed.*** Holley v. Crank, 386 F.3d
15 1248, 1256 (9th Cir. 2004).

16 Edwards v. County of San Diego, 124 Fed. Appx. 547, 548, 2005 U.S. App. LEXIS 3595, *2
17 (9th Cir. 2005) (emphasis added). Chinois will therefore treat defendants' arguments in this
18 regard as going to the adequacy of the Complaint's allegations.

19 Defendants first argue that "[p]laintiffs have not allege that **they** are members of a
20 protected class." Defendants' Brief at 22. As defendants themselves acknowledge by referring
21 the Court back to Section IV(A)(4) of their brief, this is simply defendants' standing
22 argument, redux. As explained in Part VI.A above, plaintiffs unambiguously have standing to
23 assert their § 1981 claim under the relevant authority.

24 Plaintiffs next contend that "[p]laintiffs are unable to point to even one instance in
25 which Defendants have committed racially motivated acts intended to harm Plaintiffs."
26 Defendants' Brief at 22. The short answer to this contention is that a civil rights plaintiff need
27 not allege **any** facts regarding discriminatory intent at the pleadings stage. *See, e.g., Wang v.*
28 *Office of Professional Medical Conduct*, 228 Fed. Appx. 17, 2007 U.S. App. LEXIS 7351 (2d
Cir. 2007) ("Although Wang alleges no facts that would support a finding of discriminatory
intent, he need not do so at the pleading stage.") (citing Swierkiewicz v. Sorema, 534 U.S. 506,
511-13, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)); Duran v. Ashcroft, 114 Fed. Appx. 368, 371

1 n.2 2004 U.S. App. LEXIS 23305 (10th Cir. 2004) ("At the pleading stage . . . plaintiff need
2 not allege specific facts supporting a finding of discriminatory intent so long as he points to
3 some circumstances, occurrences, or events underlying his claim of discrimination.").

4 The court in *Kim v. Nash Finch Co.*, 123 F.3d 1026 (8th Cir. 1997) explained:

5 [D]irect evidence of intentional discrimination was not required; case law
6 recognizes that intentional discrimination may be proven by circumstantial
7 evidence because "there will seldom be 'eyewitness' testimony as to the
8 employer's mental processes." United States Postal Service Board of
9 Governors v. Aikens, 460 U.S. 711, 714 n.3, 75 L. Ed. 2d 403, 103 S. Ct. 1478
10 (1983). "After all, the *McDonnell Douglas* framework exists to provide
discrimination plaintiffs a way to prove their case when they do not have
11 'explicit, inculpatory evidence of discriminatory intent.'" Shannon v. Ford
12 Motor Co., 72 F.3d 678, 682 (8th Cir. 1996), citing Hutson v. McDonnell
13 Douglas Corp., 63 F.3d 771, 776 (8th Cir. 1995).

14 123 F.3d at 1059.

15 But notwithstanding this liberal pleading standard, as already explained, plaintiffs
16 point to *many* instances in which defendants have committed racially motivated acts intended
17 to harm plaintiffs, including without limitation the improper "default notices," the failure to
18 provide adequate air conditioning, the refusal to permit plaintiffs to place a sign in the mall
19 common area regarding OPM, the closure of the door between the Casino and The Forum
20 Shops and the practice of blaming plaintiffs for every security problem anywhere in the
Caesars Palace complex involving an African-American.

21 C. The § 1981 Claim Is Not Time-Barred

22 Defendants contend that Nevada's two-year statute of limitations governing personal
23 injury actions applies to plaintiffs' § 1981 claim and that because plaintiffs allege that
24 defendants' pattern of racially discriminatory misconduct began "in or about January 2005,"
25 their entire claim is time-barred because the Complaint was not filed until January 8, 2008.
26 Defendants' Brief at 23. Defendants are wrong for at least two reasons.

1 First, defendants simply ignore the principle of “continuing violation” as it applies to
2 limitations periods. The court in *Green v. Los Angeles County Superintendent of Schools*, 883
3 F.2d 1472 (9th Cir. 1989) explained:

4 [A] systematic policy of discrimination is actionable even if some or all of the
5 events evidencing its inception occurred prior to the limitations period. The
6 reason is that the continuing system of discrimination operates against the
7 employee and violates his or her rights up to a point in time that falls within the
8 applicable limitations period.

9 883 F.2d at 1480 (citing *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 924 (9th Cir.)
10 (citation omitted), *cert. denied*, 459 U.S. 971 (1982); *Domingo v. New England Fish Co.*, 727
11 F.2d 1429, 1443 (9th Cir. 1984), *modified* 742 F.2d 520 (1984); and *Reed v. Lockheed*
12 *Aircraft Co.*, 613 F.2d 757, 760 (9th Cir. 1980)).

13 Plaintiffs here allege an “ongoing and concerted campaign of harassment and
14 misconduct” that began in January 2005 and has yet to cease, *i.e.*, a “continuing violation” of
15 § 1981. Complaint ¶ 27. No part of plaintiffs’ claim, therefore, is time barred.

16 Second, even were the “continuing violation” doctrine inapplicable, defendants offer
17 no reason as to why the misconduct that occurred within the limitations period would be time-
18 barred, and there is no reason.

19 **VII. The Sixth Cause of Action States A Claim for Breach of the Lease**

20 Defendants contend that Chinois’ Sixth Cause of Action, for breach of the Lease, fails
21 to state a claim because: (1) Chinois purportedly breached the Lease first; and (2) the
22 breaches Chinois alleges are not really breaches at all. Both arguments are ridiculous.

23 With respect to (1), here again, as with their argument with respect to Chinois’ Second
24 and Third Causes of Action, defendants seem to believe they can defeat Chinois’ claim simply
25 by making their own counter-allegations regarding breach. Defendants will be free to assert
26 affirmative defenses to Chinois’ breach of lease claim in their answer, including prior alleged
27 breach by Chinois, and to then back those defenses up with admissible evidence. But, under
28

1 the authority cited in Part III above, they may not defeat Chinois' claim simply by reciting
2 their defenses in a Rule 12(b)(6) motion. Chinois has expressly alleged that it "has complied
3 with all terms of the Lease," Complaint ¶ 95, and that allegation must be taken as true for
4 Rule 12(b)(6) purposes.

5 With respect to (2), defendants' argument suffers from the same infirmity. They will
6 be perfectly free to present evidence and argument that they did not breach the Lease at the
7 summary judgment stage or at trial, but they cannot defeat Chinois' claim at the pleading
8 stage simply by gainsaying Chinois' allegations.

9 But even leaving these fatal procedural defects aside, defendants' claim that they did
10 not breach the lease is substantively absurd as well. With respect to air conditioning at the
11 Premises, defendants point to § 7.1 of the Lease and assert that it is Chinois' fault that the
12 space OPM occupies cannot be kept cool in the summertime. Plaintiffs' complaint, however,
13 has nothing to do with the "installation, maintenance, repair or replacement" of the air
14 conditioning unit. The relevant Lease term is § 7.2, "Air Conditioning of Premises," which
15 requires defendants to provide adequate condensed water to properly cool the Premises. This
16 they have failed to do. Complaint ¶ 90.

17 Defendants' argument with respect to the covenant of quiet enjoyment is equally
18 baseless. Relying on authority from 1817 and 1921, defendants contend that breach of the
19 covenant requires "either actual or constructive eviction." Defendants' Brief at 25. Whatever
20 the scope of the covenant might have been in the hoary past, for at least the last few decades it
21 has "insulate[d] the tenant against any act or omission on the part of the landlord, or anyone
22 claiming under him, which interferes with a tenant's right to use and enjoy the premises for the
23 purposes contemplated by the tenancy." *Petroleum Collections, Inc. v. Swords*, 48 Cal. App.
24 3d 841, 846, 122 Cal. Rptr. 114, 117 (1975) (citing *Green v. Superior Court*, 10 Cal.3d 616,
25
26
27
28

625, n. 10, 111 Cal. Rptr. 704, 517 P.2d 1168 (1974); 49 Am.Jur.2d, Landlord and Tenant, § 336, p. 351). Plaintiffs' allegations fall well within this standard.

VIII. The Seventh Cause of Action States A Claim for Civil Conspiracy

"An actionable civil conspiracy 'consists of a combination of two or more persons who, by some concerted action, intend to accomplish an unlawful objective for the purpose of harming another, and damage results from the act or acts.'" *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1311, 971 P.2d 1251, 1256 (1998) (quoting *Hilton Hotels v. Butch Lewis Productions*, 109 Nev. 1043, 1048, 862 P.2d 1207, 1210 (1993) and citing *Sutherland v. Gross*, 105 Nev. 192, 196, 772 P.2d 1287, 1290 (1989)).

Defendants contend that "[t]he Complaint alleges only that the 'Defendants, and each of them, acted in concert, directly or through their common agents.'" Defendants' Brief at 26. Defendants are wrong. Plaintiffs allege that defendants acted in concert to further certain unlawful objectives, incorporating by reference the preceding 23 pages of allegations concerning the details of defendants' concerted wrongdoing. Complaint ¶ 98. In paragraph 27 of the Complaint, plaintiffs explain the motivations underlying the conspiracy.

Defendants also argue that the specialized pleading standard the U.S. Supreme Court articulated for conspiracies in restraint of trade under the Sherman Act in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1969, 167 L. Ed. 2d 929 (2007) must be applied to every mine run civil conspiracy claim. Not surprisingly, they cite no authority for this proposition. Indeed, the *Twombly* standard speaks in terms of "parallel conduct," an antitrust term of art with no bearing here. See, e.g., *Rowe Entertainment, Inc. v. William Morris Agency, Inc.*, 2000 U.S. Dist. LEXIS 9256, *20-*21, 2000-2 Trade Cas. (CCH) P72,971 (S.D.N.Y. July 6, 2000) ("certain 'parallel conduct is consistent with independent competitive decisions or at most reflects a non-consensual decision not to compete[, a]dditional facts or circumstances are needed to show that the decisions were interdependent and thus raise an inference of a tacit

1 agreement to boycott.” (quoting *Modern Home Institute, Inc. v. Hartford Accident &*
2 *Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975) and citing Donald F. Turner, *The Definition*
3 *of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv.
4 L. Rev. 655, 658-59, 681 (1962)).

5 Much more to the point is *Hayes v. Arthur Young & Co.*, 1994 U.S. App. LEXIS
6 23608, *67-*68 (9th Cir. Aug. 26, 1994) (“To assert a conspiracy, the complaints must allege
7 that [defendants] owed a duty to [plaintiffs] and that they breached this duty. . . . Both
8 complaints do so. Therefore, the civil conspiracy allegations properly state a claim and should
9 not have been dismissed.” (citation omitted)).

10
11 Finally, defendants ludicrously contend that the standard allegations in paragraph 11
12 of the Complaint that defendants acted as each other’s agents, servants, employees, etc.
13 preclude plaintiffs from stating a claim for civil conspiracy, relying on *Collins v. Union*
14 *Federal Savings & Loan Ass’n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983) and *Laxalt v.*
15 *McClatchy*, 622 F. Supp. 737, 745 (D. Nev. 1985). These cases, however, stand only for the
16 unremarkable proposition that a corporation cannot conspire with its employees, a principle
17 that has no application here. Plaintiffs do not allege that any corporate defendant conspired
18 with its own employees. Plaintiffs allege that the corporate defendants conspired with each
19 other, and nothing in the Complaint can reasonably be construed to say otherwise.

20
21 **IX. The Eighth Cause of Action States A Claim for Breach of the Covenant of Good**
22 **Faith and Fair Dealing**

23 Defendants concede, as they must, that a covenant of good faith and fair dealing is
24 implied in all contracts under Nevada law, including commercial leases. *See, e.g., A.C. Shaw*
25 *Construction, Inc. v. Washoe County*, 105 Nev. 913, 915, 784 P.2d 9, 10 (1989). The covenant
26 imposes upon the parties an “obligation of good faith in [the contract’s] performance and
27 enforcement.” 105 Nev. at 914, 784 P.2d at 9.
28

1 Defendants argue that plaintiffs have not stated a claim for breach of the covenant,
2 however, because they have failed to allege a “special relationship” between themselves and
3 defendants that would entitle them to tort damages. The problem with this contention is that
4 plaintiffs are seeking to recover contract damages, not tort damages. As the Nevada Supreme
5 Court held in *A.C. Shaw*, contract damages are available for breach of the covenant without a
6 showing of any special relationship. 105 Nev. at 915, 784 P.2d at 10.

7 Defendants also argue once again that this claim fails because Chinois purportedly
8 breached the Lease first, and because defendants did not breach the Lease. As already
9 explained, however, these arguments are not only false, but wholly inappropriate in the
10 context of a Rule 12(b)(6) motion.
11

12 Finally, defendants argue that only Forum may be held liable on this claim because it
13 is the only party to the Lease. Defendants, however, ignore plaintiffs’ allegations that the
14 Forum and Simon defendants are alter egos of each other. Complaint ¶¶ 3-6. Indeed, each of
15 the purported default notices sent to Chinois was on “Simon” or “Simon Property Group”
16 letterhead, and purported to be from “Forum Shops, LLC, By: Forum Developers Limited
17 Partnership, its sole member, By: Simon Property Group, LP, its general partner, By: Simon
18 Property Group, Inc., its general partner.” Complaint ¶¶ 43, 52 and 56.
19

20 CONCLUSION

21 For the reasons explained above, Chinois respectfully requests that the Court deny
22 defendants’ motion *in toto*. Should the Court find any of Chinois’ claims to be inadequately
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pled, however, Chinois respectfully requests that it be permitted an opportunity to amend.

DATED this _____ day of July, 2008.

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/s/

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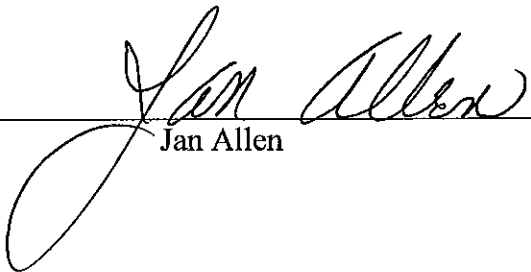
1 CERTIFICATE OF SERVICE

2 Pursuant to Fed.R.Civ.P. 5(b) and Section IV of District of Nevada Electronic Filing
3 Procedures, I certify that I am an employee of HUNTERTON & ASSOCIATES and that the
4 foregoing document was served via electronic service: OPPOSITION TO MOTION TO
5 DISMISS to:
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